No. 89-1836

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DOMINIC P. GENTILE,
Petitioner,

v.

STATE BAR OF NEVADA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

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AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 5,000 attorneys and 28,000 affiliate members, including representatives from every state. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in its House of Delegates.

The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, the NACDL has a vital interest in seeing that the proper balance is struck between the right to a fair trial and the first amendment rights of attorneys, a balance which affects not only litigants and lawyers, but the general public and our system of justice.

This case presents those issues in an unusually straightforward context with a clear record. For these reasons, NACDL appeared as amicus in the proceedings below and does so before this Court as well.

STATEMENT OF FACTS

The amicus NACDL adopts the statement of facts set forth in Petitioner Dominic Gentile's brief in support of the petition for a writ of certiorari.

ARGUMENT

I. INTRODUCTION: THE NEED FOR A DEFINITIVE AND UNIFORM STANDARD GOVERNING APPLICATION OF THE FIRST AMENDMENT TO ATTORNEYS' EXTRAJUDICIAL STATEMENTS

Attorneys, by virtue of the nature of their profession, are involved in matters of public concern and interest. The public nature and function of the justice system necessarily cast attorneys in the role of being spokespersons on matters of general community interest. Members of the bar are regularly called upon to provide information about the justice system and judicial process as well as specific litigation. Indeed, approved standards of professional responsibility for attorneys make such

a role entirely appropriate for members of the bar. *See, e.g.*, Canon 8, "A Lawyer Should Assist in Improving the Legal System," ABA Model Code of Professional Responsibility ("Model Code"). Criminal defense attorneys are especially likely to find themselves fulfilling this function, since they are commonly involved in matters of intense public discussion and concern. Such a role is entirely appropriate, as it benefits the legal system and the general public. *See Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (in reviewing constitutionality of restrictions on attorneys' extrajudicial statements, court notes that ". . . we must keep in mind that there are important areas of public concern connected with current litigation.")

An attorney's role as public spokesperson may arise in a variety of settings. Lawyers may be called upon, or find it appropriate, to provide information about the judicial system or process or particular issues which are addressed by courts. *See, e.g., Justices of the Appellate Division, First Department v. Erdmann*, 33 N.Y.2d 559, 301 N.E.2d 426 (1973); *see also Re Snyder*, 472 U.S. 634 (1985). Similarly, attorneys may be called upon, or find it appropriate, to make public statements concerning particular cases in litigation. *See Chicago Council of Lawyers v. Bauer*, 522 F.2d at 253-54 (recognizing the legitimate reasons why a criminal defense attorney may find it appropriate to make public statements concerning a case in litigation).

Regardless of the particular context, an attorney fulfilling the role of public spokesperson will find himself or herself subject to numerous professional standards, codes and rules which circumscribe what they may say. Those standards, codes and rules provide different, often times conflicting and sometimes vague guidelines or commands to the attorney.

The existence of these different and conflicting standards has been attributed to the absence of clear guidance from this Court defining the first amendment rights of lawyers in the context of insuring litigants' right to a fair trial. *See, e.g., Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325, 329 (W. Va. 1988). While some courts have bemoaned the absence of clear guidance from this Court, other lower courts, in adjudicating the validity of such disciplinary rules and standards, have attempted to discern this Court's position by relying on statements made by the Court in what are perceived to be similar circumstances. *See, e.g., Hirschkop v. Snead*, 594 F.2d 356, 369-70 (4th Cir. 1979) (en banc) (majority relies on this Court's statements in *Sheppard v. Maxwell*, 384 U.S. 333 (1966) to find that the "reasonable likelihood" standard of Disciplinary Rule 7-107, ABA Model Code, adequately protects first amendment rights of attorneys).

The existence of different, conflicting and sometimes vague professional disciplinary standards has unfortunate effects for lower courts, state bar disciplinary committees, members of the bar and the public. State courts, as well as federal district and appellate courts, are faced with legal challenges to disciplinary standards, which they must adjudicate in the absence of clear constitutional guidelines from this Court. The result is differing opinions as to the constitutionality of the same disciplinary standards. *Compare, e.g., Chicago Council of Lawyers v. Bauer, supra, with Hirschkop v. Snead, supra* (different opinions as to the constitutionality of the various provisions of DR7-107). Similarly, state bar disciplinary committees confront the difficulty of enforcing professional standards in the midst of disputed claims as to the legal validity of such provisions.

Lawyers are forced to act as public spokespersons at their own peril, unable to know with certainty what guidelines may be used to determine whether they have

engaged in professional misconduct. This problem is particularly acute for the ever-increasing group of attorneys whose practices extend beyond a single jurisdiction. For example, an attorney licensed in Illinois who is called upon to act as counsel in a matter in Virginia will find that his or her public statements are subject to conflicting standards. Moreover, given the conflicting and sometimes vague standards, as well as the different judicial opinions as to the legality of such professional standards, attorneys are unable to know with certainty what guidelines will be applied to their extrajudicial statements. This state of affairs also creates the possibility that disciplinary standards will be used, or perceived by the bar and the public to be used, in a discriminatory manner to harass attorneys who represent unpopular clients or causes. *See, e.g., Hirschkop v. Virginia State Bar*, 421 F. Supp. 1137 (E.D. Va. 1976), *aff'd in part and rev'd in part sub nom. Hirschkop v. Snead, supra* (State Bar admits that the complaints brou[illegible] against an attorney who regularly represented unpopular clients and causes "were meritless").

The upshot of this confusion and state of uncertainty is that attorney speech is chilled. As one court has recognized, "lawyers must restrict their speech 'to that which is unquestionably safe.'" *Hirschkop v. Snead*, 594 F.2d at 380 (Winter & Butzner, JJ., concurring and dissenting) *quoting Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). The public, in turn, loses out, as it is deprived of information about its justice system and the beneficial effects that such information may have. *See, e.g., Chicago Council of Lawyers v. Bauer*, 522 F.2d at 253 (recognizing the beneficial effect that statements by attorneys involved in criminal representation may have upon the political process of checking prosecutorial discretion).

All would benefit from a decision of this Court squarely examining the application of the first amendment to lawyer speech in the context of protecting litigants' right

to a fair trial. The need for a uniform national standard is paramount: and it can only be achieved through a decision of this Court. In recent years, the Court has been particularly active in examining and defining the legal standards that govern the ethics of lawyers as well as their first amendment rights. *See, e.g Shapero v. Kentucky Bar Assoc.*, 108 S. Ct. 1916 (1988); *Nix v. Whiteside*, 475 U.S. 157 (1986); *Re Snyder*, 472 U.S. 634 (1985). The Court should continue to fulfill this important need by granting review of the petitioner's case.

II. THE PUBLIC ROLE OF THE BAR AND THE FIRST AMENDMENT

Attorneys occupy a unique role in matters of public affairs. Through their regular practice of law, attorneys participate in the raising and resolving of important public issues. The public contribution of lawyers, however, is not restricted to their courtroom duties. Historically, attorneys have been spokespersons on important societal issues even outside the courtroom. For example, while litigating the Scopes "monkey trial", Clarence Darrow and William Jennings Bryan, publicly debated the issues raised by the creationism law that was the subject of the trial. *See* Allen, *Bryan & Darrow at Dayton*, Russell & Russell (1925). This traditional role of members of the bar continues to the present, as lawyers are called upon, or find it appropriate to provide public statements concerning such public issues as the safety of asbestos, *Ruggieri v. Johns-Manville Products Corp.*, 503 F. Supp. 1036 (D.R.I. 1980), consumer products issues, *Widoff v. Disciplinary Board*, 54 Pa. Comm. 124, 420 A.2d 41, *aff'd*, 491 Pa. 129, 430 A.2d 1151 (1980), *cert. denied*, 455 U.S. 914 (1982), or the fairness of judicial proceedings involving allegedly political charges, *Re Sawyer*, 360 U.S. 622 (1959).

The public benefits from this spokesperson role of attorneys, as the public's knowledge of the judicial process,

both generally and in specific cases, is increased. As the drafters of the ABA Model Rules of Professional Conduct recognized, "there are vital societal interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves." Comment, Rule 3.6, ABA Model Rules of Professional Conduct ("Model Rules").

Criminal defense lawyers, as a group, have an especially important role to play in fulfilling this function. Criminal prosecutions often involve important public issues which generate a great deal of interest and attention from the general community. *See, e.g.*, "Adultery as a Crime: Old Laws Dusted Off In a Wisconsin Case," *New York Times*, April 30, 1990, p. A1. The public appropriately expects to be informed of these issues, not just through courtroom proceedings, but also through general public discussion, often guided by statements of attorneys.

Courts have recognized that public statements by criminal defense attorneys fulfill a variety of legitimate functions. *See, e.g., Chicago Council of Lawyers v. Bauer*, 522 F.2d at 253-54. In fact, criminal defense lawyers may find it necessary to issue public statements concerning specific litigation to preserve and protect adequately the best interests of their clients. *Id.* (recognizing that criminal defense counsel may find it necessary to speak out during the investigatory stages of a criminal case to protect their clients or to make public statements to raise defense funds); *see also* American Lawyers' Code of Conduct, Chapter IX, Comment ("an accused may never be more in need of the First Amendment rights to freedom of speech than when officially labeled a wrongdoer before family, friends, neighbors and business associates. Many defendants are inarticulate; almost all need the special skills of a lawyer as spokesperson.")

One of the most important purposes that is furthered by public statements of criminal defense lawyers is to

better enable the public to function in its role as a political check on the significant discretion afforded prosecutors. *See Chicago Council of Lawyers*, 522 F.2d at 253 (recognizing that "[a]n important check on [a prosecutor's] use of . . . discretion is the political process. It is imperative that we allow as much public discussion as feasible about the way in which this authority is being exercised.") The importance of this function has increased in recent years, as this Court and others have exhibited increasing reluctance to police prosecutors' discretion through the judicial process of reversals or similar sanctions. *See, e.g., Wayte v. United States*, 470 U.S. 598 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *see also* Easterbrook, *Criminal Procedures as a Market System*, 12 J. Legal Studies 289, 298-308 (1983) (arguing that the political process is the most efficient method for policing prosecutorial discretion); Vorenburg, *Decent Restraint of Prosecutorial Discretion*, 94 Harv. L. Rev. 1521 (1981). Moreover, given the ever present public concern with the operation of the criminal justice system, criminal defense attorneys are regularly called upon to provide the public with information concerning the general operation of the criminal justice process. *See, e.g., Justices of the Appellate Division, First Department v. Erdmann, supra.*

These incidences of extrajudicial statements by lawyers, whether about specific cases or the justice system generally, will undoubtedly increase as the media continues to expand its coverage of legal events. While fair trial rights must be preserved, it need not be done at the wholesale expense of attorneys' first amendment rights or the public's right to be informed of the functioning of its justice system. However, as long as the current state of uncertainty about first amendment rights of lawyers continues to exist, such speech will be chilled and the public will ultimately suffer the consequences of being less well informed. *See* Warren & Abell, *Free Press—*

Fair Trial: The "Gag Order," A California Aberration, 45 S. Cal. L. Rev. 51, 56 (1972).

III. THE CONFLICTING PROFESSIONAL DISCIPLINE STANDARDS

The current standards, codes and rules of professional discipline governing lawyers' extrajudicial statements present a confusing, often times conflicting and sometimes vague set of rules. This was not always the case. The first set of nationally recognized professional conduct standards, the ABA Canons of Professional Ethics, touched upon the subject of extrajudicial statements of lawyers only briefly, and then only contained the recommendation that attorneys "avoid" *ex parte* statements. *See* Canon 20, ABA Canons of Professional Ethics.

The genesis of the numerous and complex standards that now exist is generally agreed to be this Court's decision in *Sheppard v. Maxwell*, 384 U.S. 333 (1966). *See* Note, *Restrictions on Attorneys' Extrajudicial Comments on Pending Litigation—The Constitutionality of Disciplinary Rule 7-107*: Hirschkop v. Snead, 41 Ohio St. L.J. 771, 774 (1980) (hereafter "Restrictions On Attorneys' Extrajudicial Comments"). In reversing Sheppard's conviction due to prejudicial pretrial publicity, the Court issued an admonition: "we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Sheppard*, 384 U.S. at 362-63.

The Court's call to action was answered; both the lower federal courts and professional associations studied the problem of controlling prejudicial publicity of legal proceedings. These groups proposed various methods to address the problem; the methods proposed were focused, for the most part however, on the need to preserve the

right of litigants to a fair trial. *See* Advisory Comm. on Fair Trial and Free Press, *ABA Project on Minimum Standards for Criminal Justice*, Standards Relating to Fair Trial and Free Press (Approved Draft, 1968); *Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391 (1968). Those studies and their recommendations then formed the basis for the concrete action that is reflected in the current standards. While starting from the same place, the various bodies and groups which developed the specific standards now in existence have arrived at different destinations.

A. ABA Model Code of Professional Responsibility

The ABA Model Code addresses the issue of fair trial and extrajudicial statements of lawyers in Disciplinary Rule 7-107. The Model Code, which was adopted and is in effect in the majority of states, is most commonly associated with a "reasonable probability" standard; that is, lawyers are prohibited from making extrajudicial statements if there is a reasonable probability that such statements will prejudice the right to a fair trial. *See* Note, *Restrictions on Attorneys' Extrajudicial Comments*, 41 Ohio St. L.J. at 773-776.

In fact, DR7-107 creates a classification system of the types of statements by subject matter content that are prohibited according to the time at which they are made. Thus, subsections (A) and (B) of DR7-107 create *per se* subject matter categories of prohibited statements that vary according to whether the statements are made during the investigation stage (subsection (A)) or the time from the filing of a complaint, indictment or information until disposition (subsection (B)). Subsection (D), which governs the period from jury selection through trial and disposition, contains a "catchall" provision which, in part, prohibits statements concerning "other matters that are reasonably likely to interfere with a fair trial. . ." The final stage of the litigation process, from disposition to sentencing, is governed by subsection (E) which prohibits an attorney from making any public statement "that is reasonably likely to affect the imposition of sentence." DR7-107(E).

The complex provisions of DR7-107 have been the subject of constitutional litigation. The two federal courts of appeals which have examined the constitutionality of DR7-107 in light of first amendment challenges, (the Seventh Circuit and the Fourth Circuit), both found infirmities in different provisions of DR7-107 but did so on different grounds, thereby further adding to the complexity and confusion. *See Hirschkop v. Snead, supra*; *Chicago Council of Lawyers v. Bauer, supra.*

B. ABA Model Rules of Professional Conduct

The ABA Model Rules, which have been adopted by a minority of states, address lawyers' extrajudicial statements in Rule 3.6, "Trial Publicity." Rule 3.6 adopts a "substantial likelihood" test—a lawyer is prohibited from making a statement about a case in litigation that is likely to be disseminated to the public and which the lawyer knows or should reasonably know "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Rule 3.6, Model Rules. In its original draft form, the Model Rules proposed a stricter standard—prohibiting only those statements that posed a "serious and imminent risk of prejudicing an impartial trial." *Model Rules of Professional Conduct* (Discussion Draft, 1980) ("Kutak Commission"), Rule 3.8.

The final approved draft of the Model Rules, which resulted in the adoption of the "substantial likelihood" test of Rule 3.6, differs in still other respects from Model Code DR7-107. Unlike DR7-107, Rule 3.6 does not contain any *per se* categories of prohibited statements. Instead, subdivision (a) of Rule 3.6 sets forth the general standard quoted above and subsection (b) then proceeds to identify subject matter categories of statements that

are presumed ("ordinarily likely") to create a substantial likelihood of materially prejudicing a criminal case or a civil matter triable to a jury. Rule 3.6, Model Rules. Model Rule 3.6 also differs from the comparative Model Code provision (DR7-107) by expanding the permissible subject matter categories of statements to include the general nature of a claim or defense in pending proceeding. *Compare* Rule 3.6(c)(1) *with* DR7-107(C). On the other hand, Model Rule 3.6 narrows the provision of DR7-107 by eliminating DR7-107(C)(7), which permits statements concerning seizure of evidence, and Rule 3.6 also narrows DR7-107 as it does not include the "catchall" provision of DR7-107(D). *See* Comment, Rule 3.6, Model Rules.

C. ABA Standards for Criminal Justice: Standards Relating To Fair Trial and Free Press

The ABA Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press (2d ed., 1978), differs from both the Model Code and the Model Rules as it adopts a "clear and present danger" test. *See* Standard 8-1.1, "Extrajudicial statements by attorneys." The original version of the Fair Trial and Free Press Standards contained a "reasonable likelihood" standard and also contained categories of prohibited statements according to subject matter, similar to DR7-107 of the Model Code. After the decision of the Seventh Circuit in *Chicago Council of Lawyers, supra*, the ABA commissioned a task force to study the need for possible changes in the Fair Trial—Free Press Standards. *See* Note, *Restrictions on Attorneys' Extrajudicial Comments*, 41 Ohio St. L.J. at 778.

The task force study resulted in the adoption of the second edition, and current version, of the Fair Trial and Free Press standards. As noted above, subdivision (a) of Standard 8-1.1 prohibits the dissemination of only those statements that "would pose a clear and present danger to the fairness of the trial." However, while subdivision (a) contains this relatively simple and first amendment protective test, subdivision (b) proceeds to list six separate subject matter categories of statements for which "a lawyer may be subject to disciplinary action" and cautions that such discipline is still "[s]ubject to paragraph (a) . . ."

D. The American Lawyers Code of Conduct

The American Lawyers Code of Conduct ("ALCC"), which was developed by the American Trial Lawyers Association under the auspices of the Roscoe Pound—American Trial Lawyers Foundation, simply prohibits "engag[ing] in publicity regarding a criminal investigation or proceeding . . . until after the announcement of a disposition of the case." ALCC, Chapter IX, Responsibilities of Government Lawyers, Rule 9.11. However, this general prohibition, which contains three narrow exceptions, applies only to government lawyers. The comments to the Rule explain that the decision to place restrictions only on government lawyers was intentional, as the drafters recognized the important role that lawyers' first amendment rights can have in the effective representation of their clients.[1] *See* page 7 *supra*, quoting ALCC, Chapter IX, Comment.

CONCLUSION

This Court's call to action in *Sheppard v. Maxwell, supra*, was promptly responded to by the legal profession. The decision in *Sheppard*, however, only examined one

[1] The value and appropriateness of placing restrictions on extrajudicial statements only made by government lawyers has been recognized and advocated by others. *See, e.g., Chicago Council of Lawyers*, 522 F.2d at 253 (holding that the restrictions of DR7-107 should not be applied to criminal defense lawyers before indictment or other formal charges has been issued); Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 Stan. L. Rev. 607 (1977).

side of the issue—the need to preserve litigants' right to a fair trial. As a result, the various standards, rules and codes which have been developed since the decision in *Sheppard* have been developed without any guidance from the Court as to the proper role of the countervailing interest of first amendment rights of lawyers. This lack of guidance is manifested in the different, often conflicting and sometimes vague rules that now exist to circumscribe lawyers' extrajudicial statements.

It is now time for the Court to address the other side of the fair trial—free press problem, and to provide guidance as to the proper role and application of first amendment rights of attorneys. This case presents an appropriate opportunity for the Court to do so; the petition for certiorari should therefore be granted.

Respectfully submitted,

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